

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMAREO JAMAIN ALLEN,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 294474
Berrien Circuit Court
LC No. 09-000846-FH

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of three counts of delivering methylenedioxymethamphetamine, or ecstasy, MCL 333.7401(2)(b)(i), and one count of possession of ecstasy, MCL 333.7403(2)(b)(i). The trial court sentenced him to three terms of 180 to 480 months' imprisonment for the delivery convictions and one term of 76 to 240 months' imprisonment for the possession conviction, all sentences to be served concurrently. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On January 18, 2009, defendant was arrested for an alleged armed robbery of 300 ecstasy pills from another man on January 1, 2009. Defendant was held in the Berrien Township Police Department for approximately four hours before being transported to the receiving area of the Berrien County jail. He was then in the holding area for about two-and-a-half days before moving upstairs to a different dormitory.

Shortly after defendant was booked into the upstairs dormitory, another inmate wrote to a deputy stating that he had information about ecstasy pills in the jail. The officer questioned that inmate and then questioned many other inmates, including defendant, about the ecstasy pills.

At trial, many inmates testified that defendant brought the ecstasy pills into jail in his underwear, which avoided detection during the pat-down searches. They also testified that defendant either gave them pills or directed some of them to give pills to other inmates. Multiple

pills were collected by the deputies from inmates and from a medical cabinet, and were admitted into evidence at trial.

During the prosecutor's direct examination of a deputy sheriff who worked at the jail, testimony was given that that deputy had read defendant his *Miranda*¹ rights prior to questioning him about the substances found in the jail. The officer went on to state that defendant told the officer he had no knowledge of what was going on and did not want to talk to the officer until his lawyer was present. The prosecutor followed up by getting the officer to agree that defendant basically did not tell him what was going on.

Following testimony of multiple officers and numerous inmates as well as physical evidence of pills and substances that were taken from the jail due to this incident, the jury convicted defendant of three counts of delivery of ecstasy and one count of possessing the same.

On appeal, defendant claims that his constitutional right of silence was violated and used against him when the prosecutor questioned the deputy sheriff who testified that defendant did not want to talk until his lawyer was present. During the trial, there was no objection made to the prosecutor's questioning of the deputy sheriff.

The issue on appeal is therefore an unpreserved claim of constitutional error. An unpreserved constitutional issue is reviewed for plain error. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009), reh granted in part 485 Mich 868; 771 NW2d 745 (2009). For an unpreserved constitutional error to warrant reversal there must have been an error that was clear or obvious that affected the outcome of the proceedings. *Id.* Additionally, that error must have resulted in the conviction of an actually innocent person, or it must have seriously affected the fairness, integrity, or reputation of the judicial proceedings. *Id.*

"As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). While any reference to a defendant's post-arrest, post-*Miranda* silence is generally prohibited; there are some circumstances where a single reference to a defendant's silence may not amount to a constitutional violation "if the reference is so minimal that silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference. . . ." *Id.* at 214-215 (internal citations omitted).

In the present case, the prosecutor's examination of the deputy established that defendant was silent after being read his rights including his right to remain silent. The deputy's testimony included a brief exchange during the prosecutor's direct examination basically stating that defendant told the deputy nothing. It also included a similarly brief exchange on cross-examination stating that defendant knew of and exercised his right to remain silent.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The issue of defendant's silence during the deputy's initial investigation was not mentioned in the prosecutor's opening or closing statements. The prosecutor did not refer to defendant's silence nor did the prosecutor imply that the jury should use defendant's silence as an inference or evidence of guilt. The one brief exchange between the prosecutor and the deputy concerning defendant's silence did not amount to a constitutional violation given that it was not repeated or referenced to the jury as substantive evidence of guilt.

Accordingly, this unpreserved constitutional error did not rise to the level of constitutional error and therefore does not satisfy the plain-error standard of review to warrant reversal.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood